

REMARKS

The Office Action Summary page lists the status of the Office Action as non-final. However, on page 6 the status of the Office Action is listed as Final. Since Applicants' amendments did not necessitate the new grounds of rejection (the amendment to claim 1 was present in original claim 12) it is assumed that the status is non-final. Clarification is respectfully requested.

Rejections under 35 USC §112

It is believed that the amendments to the claims, in part, render the rejections under 35 USC §112 moot.

With regards to claim 12, the original phrase "essentially no emulsifying agent" conveys to a skilled worker that you can have emulsifying agent only as an unintended impurity. Thus, the original phrase "essentially no emulsifying agent" absolutely provides support for "no emulsifying agent".

Thus, the rejection under 35 USC §112 should be withdrawn.

Rejections under 35 USC §103

Claims 1-6 and 8-13 stand rejected under 35 U.S.C. 103(a) as allegedly being unpatentable over Lennon et al. (US 2003/0165451), in view of Rabe et al. (US 6,019,962). Claim 7 stands rejected under 35 U.S.C. 103(a) as allegedly being unpatentable over Lennon et al. (US 2003/0165451) in view of Rabe et al. (US 6,019,962) and further in view of Suzuki et al. (US 5,219,560).

The rejections are respectfully traversed.

On page 6 of the Office Action, the Examiner states:

"The compositions of Lennon et al. contains as low as 0.1% of an emulsifier. Examiners position remains that 0.1% of an emulsifier meets the limitation "essentially" no emulsifying agent."

See *In re Marosi*, 710 F.2d 799, 803, 218 USPQ 289, 291-292 (Fed. Cir. 1983) in which the courts interpreted "essentially free" to mean that a material is present only as an unavoidable impurity. Lennon et al. (US 2003/0165451) discloses a W/O emulsion comprising at least one organic powder, one emulsifier and a semicrystalline polymer. The emulsifier is an indispensable ingredient of the compositions disclosed by Lennon et al. See, page 7 at paragraphs [0109] to paragraph [0120]. In fact, Lennon's claims require at least one emulsifier and Lennon's examples all teach at least a 2 % emulsifier. Thus, Lennon et al. positively recites the addition of emulsifier. The Examiner cannot simply ignore a claim limitation and arbitrarily decide a positive recitation means something different. Applicants' claims recite "essentially no emulsifying agent", thus allowing only trace amounts or unavoidable impurities. A person skilled in the art would be able to draw a line between unavoidable impurities and positively recited ingredients.

Furthermore, the object of the invention of Lennon et al. is to provide an improved W/O emulsion, especially in cream or in solid form with a light and fresh feel and a good stability which does not need the usually needed consistency factors such as waxes. See, paragraph [0010]. Thus, the goal of Lennon et al. is to improve the cosmetic composition by solving the stability problems. A skilled worker would recognize that without an emulsifier, an aqueous phase and an oily phase immediately separate into two different phases.

On page 3 of the Office Action, the Examiner alleges that the compositions disclosed by Lennon et al. treat and protect skin, nails, hair and/or mucous against environmental conditions (e.g. cold, wind, heat and sunlight). Lennon et al. makes no mention whatsoever of water resistance as a characteristic feature of the disclosed compositions. Furthermore, Lennon et al. does not teach the claimed water-repellent cross-linked polyester having a molecular weight of 600-8000 and consisting of polyvalent alcohols and dicarbonic acids.

The Examiner relies upon Rabe et al (US 6,019,962) for its recitation of water-repellent cross-linked polyester having a molecular weight of 600-8000 and consisting of polyvalent alcohols and dicarbonic acids. Rabe et al. adds the cross linked polyesters to improve the transfer-resistance and long wearing properties of compositions. However, like Lennon above, the compositions of Rabe et al. also contain emulsifiers. See for example, Col. 5, line 6, Col. 7, lines 38-41 and Col. 9, lines 53-64. Nothing teaches excluding

emulsifying agents from Lennon et al. and/or Rabe et al. For this reason alone the combination fails to suggest the claims.

Like Lennon et al, Rabe et al. is silent regarding water resistance. In the Example, Rabe et al. deals with non-polar solvents such as food oils. Rabe et al. is completely silent regarding polar solvents such as water. A skilled worker would recognize that polar solvents and non-polar solvents act very differently and against different types of compounds. A composition which is resistant to non-polar solvents is non necessarily resistant to polar solvents and vice versa. Rabe et al. does not deal with resistance of cosmetic compositions to all solvents. (Only food oils are given as example. That means the cosmetic composition of Rabe et al. is resistant to nonpolar solvents but not to polar solvents such as water.

Suzuki et al. is relied upon for teaching cross-linked silicone polymers. However, Suzuki et al. does not improve water resistance by adding the cross-linked silicone polymers.

Surprisingly it was found by the inventors of the present invention that the excellent water resistance and clima-protecting characteristics of the cosmetic complex of the present invention can be achieved by the combination of a gelled oil composition and the water-repellent cross-linked polyester. As noted on page 4, of the specification, "the gelled oil composition and the water-repellent cross-linked polyester are complementary in their properties...the overall effect of which exceeds the individual effect thus providing a synergistic effectiveness." Lennon et al., Rabe et al. or Suzuki et al do not recognize this synergistic effect.

Thus, neither Lennon et al. nor Rabe et al. teach or suggest a cosmetic complex that is water resistant and contains essentially no emulsifier. Nor does Lennon et al. teach the claimed water-repellent cross-linked polyester having a molecular weight of 600-8000 and consisting of polyvalent alcohols and dicarbonic acids. For this reason alone the combination fails to suggest the claims. Suzuki et al. (US 5,219,560) does not cure the deficiencies of Lennon et al. and Rabe et al. Nothing of record gives any reason to combine Suzuki et al. with Lennon et al. and/or Rabe et al. Nothing teaches excluding emulsifying agents from Lennon et al. and/or Rabe et al. Taken together the references would in no way

lead one skilled in the art to arrive at the complex of the present invention. Thus, it is respectfully requested that the rejections under 35 USC §103 be withdrawn.

The Commissioner is hereby authorized to charge any fees associated with this response or credit any overpayment to Deposit Account No. 13-3402.

Respectfully submitted,

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